No. 10173

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

IN AND FOR THE

NINTH CIRCUIT

CALIFORNIA EMPLOYMENT COMMISSION, an administrative agency of the State of California,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a copartnership of H. M. Berlin and C. T. Russell,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE APPELLANT

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JURISDICTION

This is an appeal from an Order of the District Court of the United States for the Southern District of California, Central Division, of January 26, 1942 (R. 10-14), wherein it was adjudged that the

debtor, appellee herein, was not subject to the California Unemployment Insurance Act and that the claim of the appellant herein for unemployment insurance contributions or taxes in the amount of $1,798.83, plus interest, was denied.

On April 3, 1941, the debtor-appellee filed in the District Court a petition under Chapter XI of the Federal Bankruptcy Act as amended 1938 (R. 2, 3). The District Court granted this petition by order filed April 4, 1941. On November 25, 1941, the California Employment Commission filed against the debtor in the District Court its proof of priority claim for the taxes and interest here involved. The jurisdiction of the District Court to pass on such claim is found in Sections 2a(2) and 351 of the Federal Bankruptcy Act as amended 1938. The order of the District Court was filed January 26, 1942, and notice of appeal was filed on February 20, 1942 (R. 4, 5). The case comes to this Court pursuant to the provisions of Section 128(c) of the Judicial Code and Section 24 of the Federal Bankruptcy Act as amended 1938. The appellant has filed an appeal bond in the sum of $250.00.

STATEMENT OF THE CASE

The facts are as stated in the agreed statement of the case (R. 2-7).

The California Employment Commission, appellant herein, was at all times involved herein and is

now the duly appointed and acting administrative agency of the State of California created by and exercising the powers conferred upon it by the public statute of the State of California known as Chapter 352 of the Statutes of 1935, as amended (Deering Act No. 8780d, as amended), hereinafter referred to as the California Unemployment Insurance Act (R. 2).

The debtor and appellee is a copartnership which was formed and commenced business operations in the State of California on November 7, 1941, having its principal place of business in the County of Los Angeles (R. 2). On April 3, 1941, the appellee filed in the United States District Court for the Southern District of California its petition for an arrangement under Chapter XI of the Federal Bankruptcy Act. The petition was granted the following day. Pursuant to the order or permission of the Court, the appellee continued in possession of its business and continued to operate the same until May 16, 1941, on which day all operations ceased (R. 2-3).

During the period from January 1, 1941, to May 16, 1941, the appellee had in its employ in the State of California eight or more employees on each day of each week, with the exception of holidays and some Saturdays. After May 16, 1941, the appellee had no employees (R. 3). During the period from January 1, 1941, to March 31, 1941, appellee's payroll amounted to $42,400.17. During the period

from April 1, 1941, to May 16, 1941, appellee's payroll amounted to $23,828.88 (R. 3).

The appellee filed no returns under the California Unemployment Insurance Act (R. 12).

On November 25, 1941, the appellant filed its proof of priority claim for unemployment taxes in the amount of $1,798.83, plus interest (R. 3-4), for the period from January 1, 1941, to May 16, 1941. The appellee opposed payment of said claim on the ground that no taxes were owed (R. 4). After a hearing in the District Court, an order was entered holding that the appellee did not owe said unemployment taxes (R. 4-5). The appellant has appealed from said order.

On the basis of the stipulated payroll of $66,229.05 for the period from January 1, 1941, to May 16, 1941, unemployment taxes, if any, due the appellant amount to $1,788.18, which is some $10.65 less than the amount set forth in the proof of priority claim.

THE QUESTION INVOLVED

Did the appellee, by having in its employ eight or more employees on each week day during the period from January 1, 1941, to May 16, 1941, qualify as an "employer" as that term is defined in Section 9(a) of the California Unemployment Insurance Act?

STATUTES INVOLVED

Section 9(a) of the California Unemployment Insurance Act reads as follows:

"Sec. 9. 'Employer' means:

(a) Any employing unit, which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day; provided, that prior to January 1, 1938, employer means any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals, irrespective of whether the same individuals are or were employed in each such day;"

Section 37 of the California Unemployment Insurance Act reads as follows:

"Sec. 37. (a) On and after January 1, 1936, contributions to the unemployment fund shall accrue and become payable by every employer for each calendar year in which he is subject to this act, with respect to wages paid for employment occurring during the calendar year 1936 and upon wages payable during subsequent calendar years; provided, however, that if and when the taxes payable under Title IX of the

Federal Social Security Act (or the corresponding provisions of the Internal Revenue Code, or any other Federal act into which such tax now is or hereafter may be incorporated) become payable on a basis of 'wages paid' rather than 'wages payable', then as of that time the contributions due hereunder shall thereafter be upon wages paid. Such contributions shall become due and be paid to the commission for the unemployment fund by each employer in accordance with such regulations as the commission may prescribe, and shall not be deducted in whole or in part, from the wages of individuals in his employ.

(b) In the payment of any contributions, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent."

Section 38 of the California Unemployment Insurance Act reads as follows:

"Sec. 38. Every such employer shall pay into the unemployment fund contributions equal to the following amounts:

(a) During the year 1936, with respect to payments of wages made during that year, ninety one-hundredths per cent of all wages paid by him in employment subject to this act;

(b) For the year 1937, one and eighty one-hundredths per cent of all wages payable by him during such year with respect to employment subject to this act;

(c) For the year 1938 and thereafter, two and seventy one-hundredths per cent of all wages

with respect to which contributions become due and payable for employment subject to this act.

If, when, and during such time as the excise tax required of employers by section 901 of the Social Security Act (or the corresponding provisions of the Internal Revenue Code or any other Federal act into which such tax now is or hereafter may be incorporated) is payable only upon $3,000 or less wages earned in any calendar year by any individual from any single employer as defined in section 907 of that act, (or the corresponding provisions of the Internal Revenue Code, or any other Federal act into which such tax now is or hereafter may be incorporated) the contributions required to be paid by every employer by subsection (c) hereof shall be payable only upon $3,000 or less of wages earned in any calendar year by any worker employed by such employer."

Section 90 of the California Unemployment Insurance Act reads in part as follows:

"Sec. 90. The commission, in addition to all duties imposed and powers granted or implied by the provisions of this act:

(a) Shall adopt, amend or rescind general and special rules for the administration of this act only after public hearing or opportunity to be heard thereon, of which proper notice has been given. General rules shall become effective ten days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this State. Special rules shall become effective ten days after mailing

notice thereof to the last known address of the individuals or concerns affected thereby.

(b) Shall adopt, amend or rescind regulations for the administration of this act, which shall become effective in the manner and at the time prescribed by the commission. Rules or regulations heretofore adopted shall continue in effect until amended or rescinded in accordance with the procedure prescribed by this section."

Rule 12.1 of the California Employment Commission, as the same was in effect during the period involved herein, reads as follows:

"Rule 12.1—Term Week Defined. The term 'week,' unless the wording clearly otherwise requires, whenever used in the Act, Rules and Regulations, forms, procedures and instructions thereon and all other official pronouncements of the Department of Employment, shall mean the period of seven consecutive days commencing Sunday and ending Saturday.

This revised rule shall become effective September 29, 1940, provided that an employing unit shall not become an employer subject to the Act solely by reason of its employment of four or more individuals upon said effective date if such employing unit has not, prior to said effective date, employed four or more persons in each of more than nineteen 'weeks.'

(Effective Date: September 29, 1940)"

STATEMENT OF POINTS TO BE URGED

1. The District Court erred in refusing to hold that the appellee was an "employer" during the

year 1941 within the meaning of Section 9(a) of the California Unemployment Insurance Act.

2. The District Court erred in disallowing the priority claim for unemployment taxes filed on behalf of the appellant.

ARGUMENT

I

The Appellee Was An "Employer" Within the Meaning of Section 9(a) of the California Unemployment Insurance Act for the Year 1941.

Under Section 9(a) of the California Unemployment Insurance Act, the appellee qualifies as an "employer" for the year 1941: (a) if it had four or more employees in 1941 (b) for some portion of a day (c) in each of twenty different weeks.

Apparently no dispute exists as to the meaning of the term "week." Under Rule 12.1 of the California Employment Commission, the term "week" corresponds to the calendar week, commencing Sunday and ending Saturday. The same definition was adopted by the District Court (R. 13).

The period commencing Sunday, January 5, 1941, and ending Saturday, May 10, 1941, includes 18 weeks. It is admitted that appellee had four or more employees on some day in each of those weeks. On January 2 and 3, 1941, it is agreed that the appellee had four or more employees. These days certainly were in a different week from the following 18 weeks. It is agreed that appellee had four or

more employees on May 12, 13, 14, 15, and 16, 1941. Certainly these days were in a different week from the preceding 18 weeks. Every day must be in some week. The additional days at each end of, but not within, the 18 week period must have been in two additional weeks. Consequently there were 20 days, each in a different week, during which the appellee had four or more employees in 1941.

It was contended by the appellee, and so decided by the District Court, that each of the 20 days must fall in a different complete calendar week within the year 1941. It is submitted that such a construction adds an entirely new factor not found in the definition in Section 9(a). The statute does not, either directly or by implication, require the 20 days to fall in 20 different full calendar weeks within the calendar year. If the Legislature had so intended, it very easily could have said so.

So far as we have been able to find, the only reported case bearing upon the point is *Garage Service Corporation* v. *Hassett,* 42 F. Supp. 791, decided January 12, 1942, by the United States District Court for the District of Massachusetts. That was an action to recover social security taxes, the question being whether or not the plaintiff was an "employer" for 1937 within the meaning of Section 907(a) of the Social Security Act, 42 U. S. C. A. Par. 1107(a). That section provided:

> "The term 'employer' does not include any person unless on each of some twenty days dur-

ing the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more."

From January 1, 1937 to May 11, 1937, the plaintiff employed eight or more employees. January 1 and 2 fell on a Friday and a Saturday. May 11 fell on a Tuesday. The period January 3 to May 8 included 18 full calendar weeks. The plaintiff raised the same argument advanced by the appellant herein. In rejecting this argument, the District Court stated (42 F. Supp. at 792):

"* * * I cannot agree with the plaintiff's contention that the calendar week from which a day is taken must fall within the taxable year. The statute merely requires employment on a day within the taxable year. Such a day, provided it is within the taxable year, may be taken from any calendar week, whether the calendar week is wholly within the calendar year or not, as is the case here of the week in which January 2 fell. The statute omits the words 'during the taxable year' after the words 'calendar week.' I can think of no reason to infer that Congress meant them to be implied. If the intention was that the statute should be construed as the taxpayer argues, it is apparent that Congress could have assured comprehension of their meaning by inserting the phrase 'during the taxable year' after 'calendar week' instead of after 'days.' It seems clear to me that the taxpayer was an 'employer' within the statutory definition."

CONCLUSION

The decision of the District Court, holding that the appellee was not an "employer" under Section 9(a) of the California Unemployment Insurance Act and disallowing appellant's claim, was erroneous and should be reversed.

Respectfully submitted.

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